

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2009 (*)

(Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant and surrender procedures between Member States – Article 4(6) – Ground for optional non-execution of the European arrest warrant – Implementation in national law – Person arrested a national of the issuing Member State – Non-execution of the European arrest warrant by the executing Member State conditional upon the person having spent a period of five years in its territory – Article 12 EC)

In Case C-123/08,

REFERENCE for a preliminary ruling under Articles 35 EU and 234 EC from the Rechtbank Amsterdam (Netherlands), made by decision of 28 December 2007, received at the Court on 21 March 2008, in the proceedings concerning execution of a European arrest warrant issued against

Dominic Wolzenburg,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Lenaerts and M. Ilešič, Presidents of Chambers, A. Tizzano, A. Borg Barthet, J. Malenovský, J. Klučka, U. Löhmus and L. Bay Larsen (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: M. Ferreira, Principal Administrator,

having regard to the application of the national court of 17 March 2008, received at the Court on 21 March 2008, to deal with the reference for a preliminary ruling under the urgent procedure in accordance with Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of the Court of 2 April 2008 not to deal with the reference for a preliminary ruling under the urgent procedure,

having regard to the written procedure continued by virtue of the fifth subparagraph of Article 104b(2) of the Rules of Procedure and further to the hearing on 17 February 2009,

after considering the observations submitted on behalf of:

- Mr Wolzenburg, by D. Wiersum and J. van der Putte, advocaten,
- the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,
- the Danish Government, by C. Pilgaard Zinglensen, acting as Agent,

- the German Government, by M. Lumma and J. Kemper, acting as Agents,
- the French Government, by G. de Bergues and J.-C. Niollet, acting as Agents,
- the Austrian Government, by E. Riedl and T. Fülöp, acting as Agents,
- the Polish Government, by M. Dowgielewicz, acting as Agent,
- the Commission of the European Communities, by S. Grünheid and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) and of Article 12 EC.

2 The reference has been made in the course of proceedings concerning the execution, by the Internationale Rechtshulpkamer of the Rechtbank Amsterdam (Chamber for International Cooperation in legal matters of the Amsterdam District Court; ‘the Netherlands judicial authority’) of a European arrest warrant issued on 13 July 2006 by the Staatsanwaltschaft Aachen (Public Prosecutor’s Office, Aachen; ‘the German issuing judicial authority’) against Mr Wolzenburg, a German national.

Legal context

Title VI of the EU Treaty

3 It is apparent from the information regarding the date of entry into force of the Amsterdam Treaty, published in the *Official Journal of the European Communities* of 1 May 1999 (OJ 1999 L 114, p. 56), that the Kingdom of the Netherlands made a declaration under Article 35(2) EU that it accepted the jurisdiction of the Court to give preliminary rulings in accordance with the provisions of Article 35(3)(b) EU.

Framework Decision 2002/584/JHA

4 In accordance with recital 5 in the preamble to Framework Decision 2002/584:

‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. ... Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.’

5 Recital 7 in the preamble to that Framework Decision states:

‘Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. ...’

6 Recital 8 in the preamble to that Framework Decision states:

‘Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.’

7 Article 1(1) and (2) of Framework Decision 2002/584 defines the European arrest warrant and the obligation to execute it in the following terms:

‘1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.’

8 Article 2(1) of that Framework Decision provides that, where a sentence has been passed, a European arrest warrant may be issued in respect of sentences of at least four months.

9 Article 3 of that Framework Decision lists three ‘[g]rounds for mandatory non-execution of the European arrest warrant’.

10 Article 4 of Framework Decision 2002/584, entitled ‘Grounds for optional non-execution of the European arrest warrant’ sets out those grounds in 7 paragraphs. Paragraph 6 thereof provides in that regard:

‘The executing judicial authority may refuse to execute the European arrest warrant:

...

(6) if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law’.

11 Article 5 of Framework Decision 2002/584, entitled ‘Guarantees to be given by the issuing Member State in particular cases’, reads as follows:

‘The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

...

(3) where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State’.

12 Article 11 of that Framework Decision, entitled ‘Rights of a requested person’, provides in paragraph 1 thereof:

‘When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority’.

Framework Decision 2008/909/JHA

13 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), which also applies, *mutatis mutandis*, to the enforcement of sentences in the cases set out in Article 4(6) of Framework Decision 2002/584, must, pursuant to Article 29 thereof, be implemented by the Member States by 5 December 2011.

14 Article 3(1) of Framework Decision 2008/909 states that the purpose of the decision is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence.

15 Article 4(7)(a) of that Framework Decision contains an optional provision allowing the competent authority of a Member State to forward a judgment to the Member State of execution if the sentenced person lives and has been legally residing there continuously for at least five years.

Directive 2004/38/EC

16 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28) states in recital 17 in the preamble thereto:

‘Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.’

17 Article 16(1) of that directive provides:

‘Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. ...’

18 Under Article 19(1) of the same directive:

‘Upon application Member States shall issue Union citizens entitled to permanent residence, after having verified duration of residence, with a document certifying permanent residence.’

National law

19 Article 6 of the Law on the surrender of persons (Overleveringswet) of 29 April 2004 (Staatsblad 2004, No 195; ‘the OLW’), implements Articles 4(6) and 5(3) of Framework Decision 2002/584 in the Netherlands legal order.

20 Article 6(1) to (3) of the OLW concerns Netherlands nationals. While paragraph 1 of that article implements Article 5(3) of Framework Decision 2002/584, paragraphs 2 and 3 thereof implement Article 4(6) of that decision. Article 6(2) and (3) provides:

‘2. The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision.

3. Where surrender is refused solely on the ground of paragraph 2, the public prosecutor shall notify the issuing judicial authority that it is willing to execute the judgment in accordance with the procedure laid down in Article 11 of the Convention on the Transfer of Sentenced Persons of 21 March 1983 or on the basis of another applicable convention.’

21 Article 6(5) of the OLW, which concerns persons other than Netherlands nationals, whether nationals of a Member State or of a non-Member State, provides:

‘Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration in so far as he may be prosecuted in the Netherlands for the offences on which the European arrest warrant is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.’

22 Under Article 8(e) of the Law on Aliens (Vreemdelingenwet; ‘the Vw’) of 23 November 2000 (Stb. 2000, No 495), foreign nationals are not lawfully resident in the

Netherlands as Community nationals except where their residence is based on a rule adopted under the EC Treaty or under the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

23 Article 9(2) of the Vw provides that, where a foreign national is lawfully resident by virtue of Article 8(e) thereof and is a Community national, the Netherlands Minister for Justice is to issue him with a document attesting to the lawfulness of that residence if he has acquired the right of permanent residence in accordance with Article 16 of Directive 2004/38.

24 It follows from Article 20(1) of the Vw, entitled ‘Residence permit of indefinite duration’, that the Netherlands Minister for Justice has the power to issue a residence permit of indefinite duration.

25 Article 21(1)(a) of the Vw provides that an application for a residence permit of indefinite duration within the meaning of Article 20 of that Law can be refused only where the foreign national has not been lawfully resident for a continuous period of five years immediately preceding that application, as referred to in Article 8 of the Vw.

The main proceedings and the questions referred for a preliminary ruling

26 By judgments delivered in 2002, two German courts handed down two suspended custodial sentences to Mr Wolzenburg for a number of offences committed during 2001, in particular the importation of marijuana into Germany.

27 By a judgment of 27 March 2003, the Amtsgericht Aachen (Germany) converted those suspended sentences into one combined suspended sentence (‘Gesamtstrafenbeschluss’) of one year and nine months.

28 Mr Wolzenburg entered the Netherlands at the beginning of June 2005. He resides there in an apartment in Venlo, under a letting agreement concluded in his name and in that of his wife.

29 By an order of 5 July 2005, the Amtsgericht Plettenberg (Germany) revoked the conditional suspension granted in 2003 in respect of the combined sentence on the ground that Mr Wolzenburg had infringed the conditions under which he benefited from that suspension.

30 On 13 July 2006 the German issuing judicial authority issued a European arrest warrant against Mr Wolzenburg.

31 On 17 July 2006 that authority issued an alert in the Schengen Information System (SIS) in respect of Mr Wolzenburg with a view to the enforcement of the final custodial sentence.

32 On 1 August 2006 Mr Wolzenburg was arrested and provisionally detained in the Netherlands on the basis of that alert.

33 On 3 August 2006 the German issuing judicial authority forwarded the European arrest warrant, issued on 13 July 2006, to the Netherlands judicial authority, requesting

the surrender of Mr Wolzenburg for the purpose of enforcing the sentence of one year and nine months imposed on him.

34 On 20 September 2006 Mr Wolzenburg reported to the Netherlands Immigration and Naturalisation Department to register in the Netherlands as a citizen of the Union.

35 Before beginning an apprenticeship in September 2008, Mr Wolzenburg had been employed in the Netherlands from the last trimester of 2005.

36 It is apparent from the documents placed before the Court that Mr Wolzenburg did not consent to his surrender by the Netherlands judicial authority to the German issuing judicial authority under the accelerated procedure laid down by the OLW.

37 The national court states that the facts behind the issue of the European arrest warrant against Mr Wolzenburg are punishable under Netherlands law and that he cannot lose his right to residence in the Netherlands as a result of offences for which he has been sentenced in Germany.

38 That court also observes that Mr Wolzenburg does not meet the conditions for grant of a residence permit of indefinite duration for the Netherlands on the ground that he has not yet resided in the Netherlands for a continuous period of five years, but that citizens of the Union who reside lawfully in a Member State by virtue of Community law do not always choose to apply for such a permit.

39 It was in those circumstances that the Rechtbank Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Should persons who are staying in or are residents of the executing Member State, as referred to in Article 4(6) of ... Framework Decision [2002/584], be taken to mean persons who do not have the nationality of the executing Member State, but do have the nationality of another Member State and are lawfully resident in the executing Member State pursuant to Article 18(1) EC, regardless of the duration of that lawful residence?

2a. If the answer to question 1 is negative, should the terms referred to in that question be interpreted as meaning that they concern persons who do not have the nationality of the executing Member State, but do have the nationality of another Member State and, prior to their arrest under a European arrest warrant, have been lawfully resident in the executing Member State pursuant to Article 18(1) EC for at least a certain period?

2b. If the answer to question 2a is affirmative, what requirements must lawful residence meet?

3. If the answer to question 2a is affirmative, may the executing Member State lay down, in addition to a requirement concerning the duration of lawful residence, supplementary administrative requirements, such as possession of a residence permit of indefinite duration?

4. Does a national measure specifying the conditions under which a European arrest warrant issued with a view to the enforcement of a custodial sentence is rejected by the judicial authority of the executing Member State come within the (material) scope of the EC Treaty?

5. Given that:

- Article 6(2) and (5) of the OLW lays down rules affording persons who do not have Netherlands nationality, but are in possession of a Netherlands residence permit of indefinite duration, equal treatment with Netherlands nationals

and

- those rules require refusal to surrender such classes of persons if the European arrest warrant concerns the enforcement of a final custodial sentence,

does Article 6(2) and (5) of the OLW result in discrimination prohibited by Article 12 EC, in that the aforementioned equal treatment does not apply equally to nationals of other Member States with a right of residence under Article 18(1) EC who will not forfeit that right of residence as a result of the imposition on them of a final custodial sentence, but who are not in possession of a Netherlands residence permit of indefinite duration?’

The questions referred

40 As a preliminary point, it should be recalled that, as is clear from paragraph 3 of this judgment, the Court has jurisdiction, in the present case, to rule under Article 35 EU on the interpretation of Framework Decision 2002/584.

41 Secondly, it should be stated that, in accordance with Article 32 of Framework Decision 2002/584, that decision applies to requests relating to acts which, like those in the main proceedings, were committed before the expiry of the period for implementation of the decision, namely 1 January 2004, provided the Member State of execution has not made a statement indicating that it will continue to deal with such requests in accordance with the extradition system applicable before that date. It is established that the Kingdom of the Netherlands did not make such a statement.

The fourth question

42 By its fourth question, which it is appropriate to deal with first, the national court asks, essentially, whether a national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC against national legislation, such as the OLW, which lays down the conditions under which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence.

43 In that regard, it must be noted that, although the first paragraph of Article 12 EC prohibits, within the scope of the EC Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality, Framework

Decision 2002/584 was adopted on the basis of the EU Treaty and not on that of the EC Treaty.

44 However, it cannot be inferred from that premiss that provisions adopted by a Member State in order to implement a measure under the EU Treaty are not subject to any review of their legality in the light of Community law.

45 The Member States cannot, in the context of the implementation of a framework decision, infringe Community law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States.

46 In this case, it must be held that a situation such as that of Mr Wolzenburg is covered by the right of citizens of the Union to move and reside freely in the Member States and therefore falls within the scope of the EC Treaty. By taking up residence in the Netherlands, Mr Wolzenburg exercised the right conferred by Article 18(1) EC on every citizen of the Union to move and reside freely within the territory of a Member State other than that of which he is a national.

47 The answer to the fourth question is therefore that a national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC against national legislation, such as the OLV, which lays down the conditions under which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence.

The third question

48 By its third question, which it is appropriate to consider in second place, the national court asks, essentially, whether Article 4(6) of Framework Decision 2002/584 is to be interpreted as meaning that the Member State of execution can, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a European arrest warrant laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

49 In that regard, Article 16(1) of Directive 2004/38 expressly provides that Union citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there.

50 Article 19 of that directive does not require Union citizens who have acquired a right of permanent residence in another Member State by virtue of Article 16 thereof to hold a residence permit of indefinite duration.

51 With regard to Union citizens who have been lawfully resident in another Member State for a continuous period of five years, those provisions provided merely for the issue, upon application, of a document attesting to the permanence of their residence, without requiring that formality. Such a document has only declaratory and probative force but does not give rise to any right (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 53).

52 It follows that a supplementary administrative requirement, such as a residence permit of indefinite duration within the meaning of Article 21 of the Vw, cannot, where a Union citizen is concerned, constitute a precondition to application of the ground for optional non-execution of a European arrest warrant set out in Article 4(6) of Framework Decision 2002/584.

53 Accordingly, the answer to the third question is that Article 4(6) of Framework Decision 2002/584 is to be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a European arrest warrant laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

The fifth question

54 In the light of the answer to the third question, the Court takes the view that the national court wishes to know whether the first paragraph of Article 12 EC is to be interpreted as precluding the legislation of a Member State of execution which, in implementing Article 4(6) of Framework Decision 2002/584, requires the competent judicial authority of that State to refuse to execute a European arrest warrant issued against one of its nationals whilst such a refusal is, in the case of a national of another Member State having a right of residence on the basis of Article 18(1) EC, subject to the condition that the person requested has lawfully resided for a continuous period of five years in that Member State of execution.

55 In order to answer that question, it is first necessary to make certain observations regarding the system of surrender introduced by Framework Decision 2002/584 and, in particular, in Article 4(6) thereof.

56 It is clear, in particular, from Article 1(1) and (2) of the Framework Decision and from recitals 5 and 11 in the preamble thereto that the purpose of the decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of criminal proceedings, that system of surrender being based on the principle of mutual recognition (Case C-66/08 *Kozłowski* [2008] ECR I-6041, paragraph 31).

57 The principle of mutual recognition, which underpins Framework Decision 2002/584, means that, in accordance with Article 1(2) thereof, the Member States are in principle obliged to act upon a European arrest warrant. Apart from the cases of mandatory non-execution laid down in Article 3 of the Framework Decision, the Member States may refuse to execute such a warrant only in the cases listed in Article 4 thereof (Case C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-0000, paragraph 51).

58 It follows that a national legislature which, by virtue of the options afforded it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely

reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice.

59 Indeed, by limiting the situations in which the executing judicial authority may refuse to execute a European arrest warrant, such legislation only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) of Framework Decision 2002/584, which constitutes the essential rule introduced by that decision.

60 In the light of that essential rule, Article 4 of the Framework Decision sets out the grounds for optional non-execution of a European arrest warrant, on the basis of which the competent authority in the Member State of execution may justify its refusal to execute such a warrant.

61 When implementing Article 4 of Framework Decision 2004/584 and in particular paragraph 6 thereof, referred to in the decision for reference, the Member States have, of necessity, a certain margin of discretion.

62 In that regard, it must be emphasised that, although the ground for optional non-execution set out in Article 4(6) of the Framework Decision has, just like Article 5(3) thereof, in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires (*Kozłowski*, paragraph 45), such an objective, while important, cannot prevent the Member States, when implementing that Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6) thereof.

63 Next, with regard to whether a requirement for residence for a continuous period of five years, as laid down in the national legislation at issue in the main proceedings, is contrary to the principle of non-discrimination based on nationality, it must be borne in mind that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, *inter alia*, Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56).

64 It is apparent from the decision for reference that the surrender of a Netherlands national to the issuing judicial authority for the purpose of execution of a custodial sentence imposed by final judicial decision will be refused, while for nationals of Member States other than the Kingdom of the Netherlands, such a refusal will be subject to the condition that they have lawfully resided in the Netherlands for a continuous period of five years. It is therefore necessary to examine whether the different treatment of nationals of other Member States is objectively justified.

65 In that regard, the Netherlands Government observes that, having found that, in practice, in cases involving the surrender of persons who are not nationals of the Kingdom of the Netherlands, there is a high degree of inventiveness in the arguments put forward by those persons in order to prove that they have a connection to Netherlands society, the national legislature sought, by Article 6(2) and (5) of the OLW,

to express in concrete terms, by means of objective criteria, the requirement that those persons' residence must be of lasting duration.

66 In the view of that Government, a Member State is entitled to ensure, by means of a requirement for residence of a continuous period of at least five years, that execution of European arrest warrants is refused only where the warrant is issued against requested persons who have genuine prospects of a future in the Netherlands. It is thus legitimate to require a genuine connection between the requested person and the society in which that person wishes to be reintegrated after the sentence has been completed.

67 It is necessary to point out, as has already been stated in paragraph 62 of the present judgment, that the ground for optional non-execution set out in Article 4(6) of Framework Decision 2002/584 has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires. The Member State of execution is therefore entitled to pursue such an objective only in respect of persons who have demonstrated a certain degree of integration in the society of that Member State.

68 In the present case, the single condition based on nationality for its own nationals, on the one hand, and the condition of residence of a continuous period of five years for nationals of other Member States, on the other, may be regarded as being such as to ensure that the requested person is sufficiently integrated in the Member State of execution. By contrast, a Community national who does not hold the nationality of the Member State of execution and has not resided in that State for a continuous period of a given length generally has more connection with his Member State of origin than with the society of the Member State of execution.

69 In order to be justified in the light of Community law, the difference in treatment provided for by the Netherlands legislation must also be proportionate to the legitimate objective pursued by the national law. It may not go beyond what is necessary in order to attain that objective (see, *inter alia*, Case C-158/07 *Förster* [2008] ECR I-0000, paragraph 53).

70 In that regard, the view may reasonably be taken that the rule that a European arrest warrant may not be executed against nationals of the Member State of execution does not appear to be excessive. Those nationals have a connection with their Member State of origin such as to ensure their social reintegration after the sentence imposed on them has been enforced. Moreover, nor can a condition requiring residence for a continuous period of five years for nationals of other Member States be considered to be excessive, having regard, in particular, to the conditions necessary to satisfy the requirement of integration of non-nationals in the Member State of execution.

71 In that regard, as the Netherlands and Austrian Governments have observed, that condition of residence for a continuous period of five years was laid down, as is apparent from recital 17 in the preamble to Directive 2004/38 and Article 16 thereof, precisely as the length of time beyond which Union citizens acquire a permanent right of residence in the host Member State.

72 In addition, it must be borne in mind that, although Framework Decision 2008/909 is not applicable in the main proceedings, it allows, in the context of Article 4(7)(a) thereof, Member States to make forwarding of a judgment easier when the sentenced person lives in and has been legally residing continuously for at least five years in the executing State and will retain a permanent right of residence in that State.

73 It must also be noted that a requirement for residence for a continuous period of five years, as laid down in the national legislation at issue in the main proceedings, does not go beyond what is necessary to attain the objective of ensuring that requested persons who are nationals of other Member States achieve a degree of actual integration in the Member State of execution.

74 In the light of the foregoing, the answer to the fifth question is that Article 12 EC is to be interpreted as not precluding the legislation of a Member State of execution under which the competent judicial authority of that State is to refuse to execute a European arrest warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence on the basis of Article 18(1) EC, subject to the condition that that person has lawfully resided for a continuous period of five years in that Member State of execution.

The first and second questions

75 By its first and second questions, which can be dealt with together, the national court asks, essentially, what the duration of residence in the Member State of execution must be for nationals of another Member State who are the subject of a European arrest warrant in order for them to fall within the scope of Article 4(6) of Framework Decision 2002/584.

76 It must be borne in mind that, where a Member State has implemented Article 4(6) of that decision without, however, laying down specific conditions relating to the application of that provision, it is for the executing judicial authority to make an overall assessment in order to determine, initially, whether the person concerned falls within the scope of the provision. A single factor characterising the requested person, such as the length of time that person has resided in the Member State concerned, cannot, in principle, have a conclusive effect of itself (see, to that effect, *Kozłowski*, paragraph 49).

77 With regard to the main proceedings, in which it is established that it is only where the requested person who is a national of another Member State has resided for at least five years in the Member State of execution that the European arrest warrant will not be executed, there is no longer any justification for answering the first and second questions, since the requirement as to duration of residence is based on the exercise by the Member State concerned of the discretion conferred on it by Article 4(6) of Framework Decision 2002/584 and must be regarded as compatible with Article 12 EC.

78 In that regard, it follows from the answer to the fifth question that Article 12 EC does not preclude a condition laid down by the domestic law of the Member State of execution under which requested persons who are nationals of another Member State must have resided for a period of five years in the first Member State if the executing

judicial authority is to be able to refuse to surrender them on the basis of Article 4(6) of that Framework Decision.

79 In those circumstances there is no need to answer the first two questions referred to the Court.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. A national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC against national legislation, such as the Law on the surrender of persons (Overleveringswet), of 29 April 2004, which lays down the conditions under which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence.

2. Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a European arrest warrant laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

3. Article 12 EC is to be interpreted as not precluding the legislation of a Member State of execution under which the competent judicial authority of that State is to refuse to execute a European arrest warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, whilst such a refusal is, in the case of a national of another Member State having a right of residence on the basis of Article 18(1) EC, subject to the condition that that person has lawfully resided for a continuous period of five years in that Member State of execution.

[Signatures]

* Language of the case: Dutch.